

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

DEAN COLE J.,

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH Case No. N 2006050230

DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), State of California, on August 8, 2006, in Stockton, California.

Claimant was represented at the hearing by his mother, Rachel J. The Service Agency, Valley Mountain Regional Center (VMRC), was represented at the hearing by its Assistant Director for Case Management, Anthony Hill.

Oral and documentary evidence was received. After the parties' closing arguments, the record was closed and the matter was submitted for decision on August 8, 2006.

ISSUE

Is claimant "developmentally disabled" due to mental retardation and therefore eligible for regional center services under the Lanterman Act, or is VMRC entitled to determine claimant's eligibility during his Early Start Program's Individualized Family Service Plan (IFSP) transition meeting that must occur between his 30th and 33rd birth months?

FACTUAL FINDINGS

1. Claimant Dean J. is currently two years and eight months old. He will turn three years old on January 1, 2007. Shortly after his birth, claimant was placed in the foster care home of Mr. V. When he was four months old, claimant moved into the foster home of Mr. V.'s daughter, Rachel J., who has since adopted him.

2. Claimant has a wide variety of medical problems. Since infancy, claimant has been diagnosed with idiopathic hyperreninemia hypertension. He has chronic high blood pressure that must be tested several times a day and is controlled by medication. Claimant has asthma that is treated with albuterol. He has acrocyanosis, which is seen as sudden bouts of bluish discoloration on his hands and feet. Claimant has facial and body dysmorphism, developmental delay, sensory integration difficulties, and social/behavioral concerns. Claimant has frequent medical appointments and is seen regularly by a variety of doctors at Children's Hospital of Central California, including by a nephrologist [kidney specialist], a neurologist, a geneticist, and a pediatrician.

3. Claimant is currently eligible for VMRC's services through the Early Start Program. Claimant's Early Start eligibility was determined based upon his status as an individual "at risk" of developmental disability. (Gov. Code § 95000 et seq.)¹ It does not constitute a determination that he is "developmentally disabled" under the Lanterman Developmental Disabilities Services Act (Lanterman Act), which is a separate statutory scheme, with distinct eligibility criteria. (Welf. & Inst. Code § 4500, et seq.)²

4. VMRC's Early Start Program Manager Nikki Gillespie testified that claimant's Early Start eligibility is based on his overall developmental delays, particularly in expressive and receptive language, and that he also exhibits sensory defensiveness. In his November 2005, IFSP, claimant's present levels of performance at a chronological age of 22 months, were as follows:

<u>Area</u>	<u>Developmental Level</u>
Social	9 – 12 months
Communication	12 – 15 months

¹ Under the Early Start Program, an "at-risk infant or toddler" means "an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to that individual." (20 U.S.C. § 1432(1).) In California, an "eligible infant or toddler" is one from birth through two years of age, for whom a need for early intervention services, as specified in the Individuals with Disabilities Education Act, is documented, including "infants and toddlers with a developmental delay in one or more of the following five areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development." (Gov. Code § 95014.)

² Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

Adaptive	12 – 15 months
Cognitive	15 – 18 months
Fine motor	14 – 18 months
Gross motor	19 months

5. Claimant's IFSP identifies services that are directly related to these delays. Currently, claimant receives the following Early Start Services:

- a. in-home infant development services, with infant development specialist Pamela Stime, two hours a week, focusing on language development and parent training;
- b. occupational therapy in the form of sensory integration training with Brighter Futures Therapeutic Learning Center, twice a week in clinic;
- c. mileage reimbursement for transportation to Brighter Futures clinic in Modesto;³ and
- d. a speech and language evaluation by speech and language pathologist Cathleen Hiromoto.

6. Infant development specialist Pamela Stime assessed claimant with the Early Learning Accomplishment Profile (LAP), which uses parent interview, observation, and direct interaction to determine developmental levels. Ms. Stime documented her observations and the LAP assessments results in periodic reports to the Early Start Program. The LAP scores reported by Ms. Stime demonstrate that claimant's cognitive development, as well as his language, self-help, and social/emotional skills, have been consistently delayed, but have continued to improve over time.⁴

7. Speech and language pathologist Cathleen Hiromoto administered the Preschool Language Scale – 4th Edition (PLS-IV) to claimant when he was 26 months old. In her March 23, 2006, evaluation report, Ms. Hiromoto reported that claimant's auditory comprehension (receptive language) was at an age-equivalent of 10 months and his expressive language was at an age-equivalent of 16 months. Ms.

³ This service was added by the IFSP addendum dated and signed by claimant's mother on June 6, 2006.

⁴ On the LAP, at age 17 months, claimant's cognitive development was at the 8 to 10 month level, his language was at the 5 month level, and his self help and social/emotional skills were both at a 9 month developmental level. By age 22.5 months, claimant's cognitive development was at the 15 to 18 month level, his language was at the 12 to 15 month level, his self help skills was at the 12 to 15 month level, and his social/emotional skills were at the 9 to 12 month level. By May 2006, at age 28.5 months, claimant's cognitive abilities were at the 18 to 22 month level, his language was at the 18 to 21 month level, his self help was at the 18-21 month level, and his social/emotional skills were at the 18 month level.

Hiromoto indicated that these PLS-IV scores demonstrated that claimant has a “significant” language delay.

8. In late March or early April 2006, claimant’s mother asked VMRC Early Start service coordinator Violet Lazar to provide her with a letter specifying the rate that VMRC would have to fund if it placed claimant, as a developmentally disabled child, in one of its vendored facilities. Claimant’s mother wanted this “rate letter” to establish a “specialized care increment” under the Adoption Assistance Program (AAP), as set forth in California Code of Regulations, title 22, section 3533.⁵ At the time of this request, claimant was approximately two years three months (27 months) old.

9. Claimant’s request was reviewed by two VMRC specialists: clinical psychologist, Gary Westcott, Ph.D., and medical director, James Popplewell, M.D. On April 3, 2006, after reviewing claimant’s file and conferring with Dr. Popplewell, Dr. Westcott advised Ms. Lazar that a determination of claimant’s eligibility for Lanterman Act services could not be made at this time, but would be completed at or near claimant’s third birthday. In a written memorandum to Ms. Lazar, Dr. Westcott explained that:

[w]hile such an outcome may well eventuate in his case, at this age and based upon the information available, a determination of developmental disability cannot be made. . . I would strongly recommend continuing to carry him as an at risk child to allow for further developmental progress with appropriate assessments gathered and final determination of possible developmental disability to occur at or near three years of age per standard VMRC practices.

Put succinctly, at this age and without clear evidence of any underlying significant syndrome known to be linked closely with mental retardation, a determination of life long developmental disability is premature.

10. In addition, VMRC’s director of case management services, Paul Billodeau, determined that he could not provide claimant with a “rate letter” until he was formally determined to have a developmental disability. VMRC will provide “rate letters” to support a higher level of AAP funding only after a client is found eligible with a developmental disability under the Lanterman Act. This determination is made shortly before the client’s third birthday.

⁵ That section provides, in pertinent part, that “[i]f the child is a client of a California Regional Center (CRD) for the Developmentally Disabled, the maximum [AAP] rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services...”

11. On April 6, 2006, Ms. Lazar sent Ms. J. a letter and a Notice of Proposed Action denying claimant's request for a determination of eligibility under the Lanterman Act. The reason given for the proposed action was that "there is no evidence of epilepsy, mental retardation, cerebral palsy, or autism."

12. On May 4, 2006, claimant's mother filed a fair hearing request in which she indicated that claimant, "definitely has problems. He is mentally retarded. He also has autistic behavior. He is very behind in all areas. Children's Hospital even wrote a letter saying that he is very behind and retarded." Ms. J. requested a rate letter, backdated to the date of her initial request.

13. Claimant's Early Start program services are addressing his developmental delays at this time. According to Ms. Gillespie, claimant has benefited from the Early Start services which have been very therapeutic and of a high intensity. Dr. Popplewell testified that the Early Start services are a practical approach to dealing with claimant's developmental delays.

14. Claimant did not offer any testimony or documentary evidence that his Early Start program was not appropriate to meet his needs. Rather, claimant contended that he requires an early determination that he is a permanent client of VMRC based upon mental retardation, and/or autism, and a rate letter. In addition to the increased funding that would result from the rate letter, claimant wishes to ensure that there is no break in his services that might detrimentally affect his education and development.

15. The Early Start regulations require that a "transition" IFSP meeting be convened when a client is between 30 - 33 months of age to discuss a variety of subjects, including the child's eligibility under the Lanterman Act for VMRC services, and educational services. (Cal. Code Regs., title 17, § 52112.) At the time of the hearing in this matter, all parties agree that VMRC had begun this process and that the transition IFSP meeting would occur once school was back in session. Claimant was 30 months old in July 2006 and he will be 33 months old in October 2006.

Evidence regarding mental retardation

16. Claimant has never received a formal diagnosis as an individual with mental retardation using the criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV-TR)*.⁶ Claimant's mother believes claimant has mental retardation, and she has reported that he has retardation or

⁶ The *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, Text Revision (DSM-IV-TR)*, published in 2000 by the American Psychiatric Association, prescribes the diagnostic features and criteria for mental retardation, and is the accepted standard for defining mental retardation.

“profound retardation” to the Children’s Hospital of Central California where he receives many of his medical services.

Claimant has been characterized as having mental retardation by Dr. Wolf of the neurology clinic at the Children’s Hospital of Central California. During his September 21, 2005, clinical examination of claimant, Dr. Wolf reported the following impression:

Presumed genetic disorder with a cardinal presentation of short stature and hypertension, but also with other mild dysmorphic features and mental retardation.

Dr. Wolf also indicated that there is a strong biological family history of mental retardation and psychiatric disorders. He also noted that there are multiple causes of mental retardation, including chromosomal and single gene mutation, and that claimant would be scheduled for additional chromosomal and fragile X gene testing.

On February 22, 2006, Dr. Wolf conducted a follow up evaluation and reported that:

Dean presents as a young man who obviously has some type of genetic syndrome, which presents with short limbs, short stature and mental retardation. He has made very little progress in his development since seen in September. . .

There was no indication of the results, if any, from chromosomal and fragile X gene testing. Dr. Wolf did not testify at the hearing. His reports do not contain any objective data to substantiate a finding of mental retardation.

Testimony of Dr. Westcott and Dr. Popplewell

17. Dr. Westcott is a licensed clinical psychologist who is VMRC’s clinic manager. In this capacity, Dr. Westcott is a member of VMRC’s Lanterman Act eligibility review team. In late March of 2006, Dr. Westcott reviewed claimant’s case file and concluded there was not sufficient information to determine, from a psychological perspective, whether claimant was an individual with mental retardation. Consequently, he asked Dr. Popplewell to review claimant’s file to determine if there was medical information upon which to base a finding of eligibility.

Dr. Westcott testified that he reviewed the letter from Children’s Hospital that stated claimant had mental retardation; however, the letter did not contain any underlying data to confirm this as a diagnosis, rather than an observation. A finding of mental retardation under the Lanterman Act requires that the *DSM-IV-TR* criteria

for mental retardation be met: i.e., intelligence testing that establishes an intelligence quotient (I.Q.) of 70 or below, plus adaptive skill deficits.

Where a two- to three-year-old child with suspected retardation also has speech deficits, special care must be taken to ensure that the child is not erroneously identified with mental retardation. Dr. Westcott noted that many bright people have speech and language developmental delays. While claimant's March 2006 PLS-IV scores showed significant language delays, these scores only suggest that claimant falls in the borderline (i.e., not eligible) to the mildly mentally retarded range. More precision is not possible.

To address this issue, Dr. Westcott testified that VMRC generally waits until as close to age three as possible to determine eligibility, using as much data as is possible. If the data is still insufficient at that age, generally the regional center will make the child provisionally eligible for a one-year period to allow for a more precise diagnosis. In his view, claimant would likely either be found fully eligible once formal assessment is conducted for his Early Start transition IFSP meeting, or he would be made eligible for one year.

18. Dr. Popplewell concurred with Dr. Westcott's testimony. In addition, while Dr. Popplewell agreed that claimant has many medical problems, none of his medical conditions establish eligibility by themselves. Claimant does not have epilepsy, cerebral palsy or autism. Dr. Popplewell emphasized that the impressions of mental retardation reported by Children's Hospital were based on clinical observations rather than on the type of testing required by the *DSM-IV-TR* for a finding of eligibility under the Lanterman Act. In his opinion, claimant's PLS-IV scores could mean that his I.Q. is anywhere from 64 to 75, a range that both encompasses and excludes a diagnosis for mental retardation.

19. All VMRC representatives who testified expressed the opinion that claimant will be found either fully or provisionally eligible for Lanterman Act services based upon mental retardation during the upcoming transition assessment and IFSP process required to take place by the Early Start Program no later than his 33 birth month, or by October 2006.

LEGAL CONCLUSIONS

1. "Early Start" is the name used in California to refer to a federal program to provide services for infants and toddlers at risk for certain disabilities. The controlling federal law is Subchapter III of the Individuals with Disabilities Education Act (IDEA), 20 U.S. C. Sections 1431-1445, and its applicable federal regulations, 34 Code of Federal Regulations sections 303, et seq. Each state was given the opportunity to receive federal funds to provide services to certain children 36 months of age and younger, if they complied with specific rules and regulations.

California chose to participate and passed the necessary legislation, known as the California Early Intervention Services Act (Gov. Code § 95000 et seq.), and developed implementing regulations (Code of Reg., title 17, §§ 52000 through 52175). The Department of Developmental Services is the lead agency responsible for administering the Early Start program. (Gov. Code § 95014, subd. (b).) Under the Early Intervention Services Act, direct services to infants and toddlers are provided through the regional center system that was established under the Lanterman Act. (Gov. Code § 95004.) Although Early Start services are administered through the regional centers, the provisions of the Lanterman Act do not govern the Early Start program in any respect.

2. Section 52112 of the California Code of Regulations, title 17, details the timelines and requirements for transitioning the at-risk child from the Early Intervention Services Program. These requirements include (1) “identifying needed assessments to determine regional center and special education eligibility and determining the regional center or LEA responsible and time lines for completing the needed assessments,” and (2) “develop[ing] an IPP [Individual Program Plan] if the toddler is also eligible for services under the Lanterman Developmental Disabilities Services Act as required in Welfare and Institutions Code Section 4646.” The transition IFSP must occur between the child’s 30th and 33rd birth months. (*Id.*)

As set forth in Factual Findings 3, 4, 5, 13, 14, and 15, claimant has been determined eligible for the Early Start program, his transition IFSP is being scheduled, and he does not raise any issues relating to the appropriateness of his Early Start services.

3. Section 4512, subdivision (a), of the Lanterman Act, defines the term “developmental disability” in as follows:

Developmental disability means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

4. Section 4512, subdivision (l) provides:

‘Substantial disability’ means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

The Lanterman Act’s implementing regulations acknowledges that a substantial handicap “represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.” (Cal. Code Regs., tit. 17 § 52001, subd. (a)). The regional center’s assessment must address each of these areas. (Cal. Code Regs., tit. 17 § 52001, subd. (b)).

5. The Lanterman Act does not assign the burden of proof to either party. Its fair hearing procedures merely provide that, absent an agreement or good cause, the service agency shall present its witnesses and evidence first, but that this requirement “does not alter the burden of proof.” (§ 4712, subd. (j).) No appellate court has decided this issue regarding the Lanterman Act; however, appellate courts have dealt with similar issues in other contexts. Most recently, in *Schaffer v. Weast* (Nov. 14, 2005) 126 S. Ct. 528, 2005 U.S. Lexis 8554, the United States Supreme Court held that the burden of proof in an administrative hearing challenging an individualized education program (I.E.P.) under the Individuals with Disabilities in Education Act, 20 U.S.C. 1400 et seq., is on the party seeking relief.

In this matter, as the party seeking relief, claimant has the burden of proof. As no other statute or law specifically applies to the Lanterman Act, the degree of proof in this case is preponderance of the evidence. (Evid. Code, § 115.)

6. As set forth in the Factual Findings as a whole, it is clear that claimant has significant developmental delays, including cognitive delays. As set forth in Factual Findings 16 through 19, however, there is not sufficient evidence, at this time, that claimant meets the *DSM-IV-TR* diagnostic criteria for mental retardation and can thus be determined to have a developmental disability on this basis. In addition, claimant offered no evidence of autism, and he did not contend that he had a condition closely related to mental retardation or one that requires treatment similar to that required for individuals with mental retardation. Claimant did not meet his

burden of proof. Accordingly, VMRC correctly determined that claimant was not eligible for Lanterman Act services in April 2006. VMRC is required to determine claimant's eligibility following appropriate assessments during his Early Start transition IFSP meeting.

ORDER

Claimant's request for an order directing Valley Mountain Regional Center to certify him as an eligible developmentally disabled consumer is DENIED at this time.

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days of receipt of this Decision. (§ 4712.5(a).)

DATED: August 31, 2006

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings